



Department of Defense

Military Commission Instruction No. 5

April 30, 2003

SUBJECT: Qualification of Civilian Defense Counsel

- References:
- (a) Military Commission Order No. 1 (Mar. 21, 2002)
 - (b) Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833 (Nov. 16, 2001)
 - (c) Section 113(d) of Title 10 of the United States Code
 - (d) Section 140(b) of Title 10 of the United States Code
 - (e) Military Commission Instruction No. 1, current edition
 - (f) Section 1001 of Title 18 of the United States Code
 - (g) DoD 5200.2-R, "Personnel Security Program," current edition

1. PURPOSE

This Instruction establishes policies and procedures for the creation and management of the pool of qualified Civilian Defense Counsel authorized in Section 4(C)(3)(b) of reference (a) in accordance with reference (b).

2. AUTHORITY

This Instruction is issued pursuant to Section 7(A) of reference (a) and in accordance with references (c) and (d). The provisions of reference (e) are applicable to this Instruction.

3. POLICIES AND PROCEDURES

A. Application Procedures

- 1) Civilian attorneys may be prequalified as members of the pool of attorneys eligible to represent Accused before military commissions at no expense to the United States if, at the time of application, they meet the eligibility criteria set forth in Section 4(C)(3)(b) of reference (a) as further detailed in this

Instruction, or they may be qualified on an ad hoc basis after being requested by an Accused. In both cases, qualification results in membership in the pool of available Civilian Defense Counsel.

- 2) An attorney seeking qualification as a member of the pool of available Civilian Defense Counsel shall submit an application, by letter, to:

Office of the General Counsel, Department of Defense
(Attn: Chief Defense Counsel, Office of Military Commissions)
1600 Defense Pentagon
Washington, DC 20301-1600

Applications will be comprised of the letter requesting qualification for membership, together with the following documents that demonstrate satisfaction of the criteria set forth in Section 4(C)(3)(b) of reference (a):

- a. Section 4(C)(3)(b)(i), *Civilian Defense Counsel shall be United States citizens*. Applicants will provide proof of citizenship (e.g., certified true copy of passport, birth certificate, or certificate of naturalization).
- b. Section 4(C)(3)(b)(ii), *Civilian Defense Counsel shall be admitted to the practice of law in a State, district, territory or possession of the United States, or before a Federal court*. Applicants will submit an official certificate showing that the applicant is an active member in good standing with the bar of a qualifying jurisdiction. The certificate must be dated within three months of the date of the Chief Defense Counsel's receipt of the application.
- c. Section 4(C)(b)(iii), *Civilian Defense Counsel shall not have been the subject of any sanction or disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct*.
 - i. An applicant shall submit a statement detailing all sanctions or disciplinary actions, pending or final, to which he has been subject, whether by a court, bar or other competent governmental authority, for misconduct of any kind. The statement shall identify the jurisdiction or authority that imposed the sanction or disciplinary action, together with any explanation deemed appropriate by the applicant. Additionally, the statement shall identify and explain any formal challenge to the attorney's fitness to practice law, regardless of the outcome of any subsequent proceedings. In the event that no sanction, disciplinary action or challenge has been imposed on or made against an applicant, the statement shall so state. Further, the applicant's statement shall identify each jurisdiction in which he has been admitted or to which he has applied to practice law, regardless of whether the applicant maintains a current active license in that jurisdiction, together with any dates of admission to or rejection by each such jurisdiction and, if no longer active, the date of and basis for

inactivation. The above information shall be submitted either in the form of a sworn notarized statement or as a declaration under penalty of perjury of the laws of the United States. The sworn statement or declaration must be executed and dated within three months of the date of the Chief Defense Counsel's receipt of the application.

- ii. Further, applicants shall submit a properly executed Authorization for Release of Information (Annex A), authorizing the Chief Defense Counsel or his designee to obtain information relevant to qualification of the applicant as a member of the Civilian Defense Counsel pool from each jurisdiction in which the applicant has been admitted or to which he has applied to practice law.
- d. Section 4(C)(b)(iv), *Civilian Defense Counsel shall be determined to be eligible for access to information classified at the level SECRET or higher under the authority of and in accordance with the procedures described in Department of Defense Regulation, DoD 5200.2-R, "Personnel Security Program."*
 - i. Civilian Defense Counsel applicants who possess a valid current security clearance of SECRET or higher shall provide, in writing, the date of their background investigation, the date such clearance was granted, the level of the clearance, and the adjudicating authority.
 - ii. Civilian Defense Counsel applicants who do not possess a valid current security clearance of SECRET or higher shall state in writing their willingness to submit to a background investigation in accordance with reference (g) and to pay any actual costs associated with the processing of the same. The security clearance application, investigation, and adjudication process will not be initiated until the applicant has submitted an application that otherwise fully complies with this Instruction and the Chief Defense Counsel has determined that the applicant would otherwise be qualified for membership in the Civilian Defense Counsel pool. Favorable adjudication of the applicant's personnel security investigation must be completed before an applicant will be qualified for membership in the pool of Civilian Defense Counsel. The Chief Defense Counsel may, at his discretion, withhold qualification and wait to initiate the security clearance process until such time as the Civilian Defense Counsel's services are likely to be sought.
- e. Section 4(C)(b)(v), *Civilian Defense Counsel shall have signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the course of proceedings.* This requirement shall be satisfied

by the execution of the Affidavit And Agreement By Civilian Defense Counsel at Annex B to this Instruction. The Affidavit And Agreement By Civilian Defense Counsel shall be executed and agreed to without change, (*i.e.*, no omissions, additions or substitutions). Proper execution shall require the notarized signature of the applicant. The Affidavit And Agreement By Civilian Defense Counsel shall be dated within three months of the date of the Chief Defense Counsel's receipt of the application.

- 3) Applications mailed in a franked U.S. Government envelope or received through U.S. Government distribution will not be considered. Telefaxed or electronic mail application materials will not be accepted. Failure to provide all of the requisite information and documentation may result in rejection of the application. A false statement in any part of the application may preclude qualification and/or render the applicant liable for disciplinary or criminal sanction, including under reference (f).

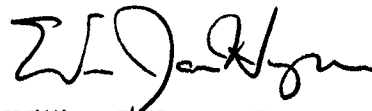
B. Application Review

- 1) The Chief Defense Counsel or his designee shall review all Civilian Defense Counsel pool applications for compliance with references (a) and (b) and with this Instruction.
- 2) The Chief Defense Counsel shall consider all applicants for qualification as members of the Civilian Defense Counsel pool without regard to race, religion, color, sex, age, national origin, or other non-disqualifying physical or mental disability.
- 3) The Chief Defense Counsel may reject any Civilian Defense Counsel application that is incomplete or otherwise fails to comply with references (a) and (b) or with this Instruction.
- 4) Subject to review by the General Counsel of the Department of Defense, the Chief Defense Counsel shall determine the number of qualified attorneys that shall constitute the pool of available Civilian Defense Counsel. Similarly, subject to review by the General Counsel of the Department of Defense, the Chief Defense Counsel shall determine the qualification of applicants for membership in such pool. This shall include determinations as to whether any sanction, disciplinary action, or challenge is related to relevant misconduct that would disqualify the Civilian Defense Counsel applicant.
- 5) The Chief Defense Counsel's determination as to each applicant's qualification for membership in the pool of qualified Civilian Defense Counsel shall be deemed effective as of the date of the Chief Defense Counsel's written notification publishing such determination to the applicant. Subsequent to this notification, the retention of qualified Civilian Defense Counsel is effected upon written entry of appearance, communicated to the military commission through the Chief Defense Counsel.
- 6) The Chief Defense Counsel may reconsider his determination as to an individual's qualification as a member of the Civilian Defense Counsel pool

on the basis of subsequently discovered information indicating material nondisclosure or misrepresentation in the application, or material violation of obligations of the Civilian Defense Counsel, or other good cause, or the matter may be referred to the Appointing Authority or the General Counsel of the Department of Defense, who may revoke or suspend the qualification of any member of the Civilian Defense Counsel pool.

4. EFFECTIVE DATE

This Instruction is effective immediately.

A handwritten signature in black ink, appearing to read "W. J. Haynes II".

William J. Haynes II
General Counsel of the Department of Defense

ANNEX A to Department of Defense Military Commission Instruction No. 5,
“Qualification of Civilian Defense Counsel”

UNITED STATES OF AMERICA

Authorization for Release of Information

(Carefully read this authorization to release information about you, then sign and date it in ink.)

I authorize the Chief Defense Counsel, Office of Military Commissions, Department of Defense, his designee or other duly authorized representative of the Department of Defense who may be charged with assessing or determining my qualification for membership in the pool of Civilian Defense Counsel available to represent Accused before military commissions, to obtain any information from any court, the bar of any State, locality, district, territory or possession of the United States, or from any other governmental authority.

This information may include, but is not limited to, information relating to: any application for a security clearance; my admission or application for admission to practice law in any jurisdiction, including action by the jurisdiction upon such application, together with my current status with regard to the practice of law in such jurisdiction; any sanction or disciplinary action to which I have been subject for misconduct of any kind; and any formal challenge to my fitness to practice law, regardless of the outcome of subsequent proceedings.

I authorize custodians of such records or information and other sources of information pertaining to me to release such at the request of the officials named above, regardless of any previous agreement to the contrary.

I understand that for certain custodians or sources of information a separate specific release may be required and that I may be contacted for the purposes of executing such at a later date.

I understand that the records or information released by custodians and other sources of information are for official use by the Department of Defense, only for the purposes provided herein, and that they may be redisclosed by the Department of Defense only as authorized by law.

Copies of this authorization that show my signature are as valid as the original signed by me. This authorization is valid for five (5) years from the date signed or upon termination of my affiliation with the Department of Defense, whichever is later.

Signature (sign in ink) SSN

Date

ANNEX B to Department of Defense Military Commission Instruction No. 5, "Qualification of Civilian Defense Counsel"

AFFIDAVIT AND AGREEMENT BY CIVILIAN DEFENSE COUNSEL

Pursuant to Section 4(C)(3)(b) of Department of Defense Military Commission Order No. 1, "Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism," dated March 21, 2002 ("MCO No. 1"), Military Commission Instructions No. 4, "Responsibilities of the Chief Defense Counsel, Detailed Defense Counsel, and Civilian Defense Counsel" ("MCI No. 4") and No. 5, "Qualification of Civilian Defense Counsel" ("MCI No. 5"), and in accordance with the President's Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833 (Nov. 16, 2001) ("President's Military Order"), I [Name of Civilian Attorney], make this Affidavit and Agreement for the purposes of applying for qualification as a member of the pool of Civilian Defense Counsel available to represent Accused before military commissions and serving in that capacity.

I. Oaths or Affirmations. I swear or affirm that the following information is true to the best of my knowledge and belief:

A. I have read and understand the President's Military Order, MCO No. 1, MCI No. 4, MCI No.5, and all other Military Commission Orders and Instructions concerning the rules, regulations and instructions applicable to trial by military commissions. I will read all future Orders and Instructions applicable to trials by military commissions.

B. I am aware that my qualification as a Civilian Defense Counsel does not guarantee my presence at closed military commission proceedings or guarantee my access to any information protected under Section 6(D)(5) or Section 9 of MCO No. 1.

II. Agreements. I hereby agree to comply with all applicable regulations and instructions for counsel, including any rules of court for conduct during the course of proceedings, and specifically agree, without limitation, to the following:

A. I will notify the Chief Defense Counsel and, as applicable, the relevant Presiding Officer immediately if, after the execution of this Affidavit and Agreement but prior to the conclusion of proceedings (defined as the review and final decision of the President or, if designated, the Secretary of Defense), there is any material change in any of the information provided in my application, including this Affidavit and Agreement, for qualification as member of the Civilian Defense Counsel pool. I understand that such notification shall be in writing and shall set forth the substantive nature of the changed information.

B. I will be well prepared and will conduct the defense zealously, representing the Accused throughout the military commission process, from the inception of my representation through the completion of any post-trial proceedings as detailed in Section 6(H) of MCO No. 1. I will ensure that these proceedings are my primary duty. Prior to undertaking representation of an Accused, I will ensure that I can commit sufficient time and resources to handle an Accused's case expeditiously through its conclusion. In making this assessment, I am aware that the Presiding

Officer may deny any request for a delay or continuance of proceedings based on reasons relating to matters that arise in the course of my law practice or other professional or personal activities that are not related to military commission proceedings, if in the Presiding Officer's determination such a continuation would unreasonably delay the proceedings.

- C. The Defense Team shall consist entirely of myself, Detailed Defense Counsel, and other personnel provided by the Chief Defense Counsel, the Presiding Officer, or the Appointing Authority. I understand I must include the justification for particular individuals to be added to the defense team in a request to the Chief Defense Counsel, the Presiding Officer, or the Appointing Authority as appropriate, and I will state any special requests regarding access to the Accused, Protected Information, as defined in MCO No. 1, Paragraph 6.D.5.a, or the ability to enter into a confidential relationship. Regarding entering into a confidential relationship, I understand that those determined eligible to receive attorney confidences or attorney work product will be required to complete an affidavit similar to this Annex prior to receiving any attorney confidences or attorney work product. I further understand that those I request to have access to an Accused, other detainees, or Protected Information will be required to obtain a security clearance and be specifically approved for access to each individual or item of Protected Information requested, prior to access being granted. I understand that nothing in this agreement allows me to disregard any laws, rules, regulations, or instructions governing the handling of classified information or other Protected

Information. I will make no claim against the U.S. Government for any fees or costs associated with my conduct of the defense or related activities or efforts.

- D. Recognizing that my representation does not relieve Detailed Defense Counsel of duties specified in Section 4(C)(2) of MCO No. 1, I will work cooperatively with such counsel to ensure coordination of efforts and to ensure such counsel is capable of conducting the defense independently if necessary.
- E. During my representation of an Accused before military commissions, unless I obtain approval in advance from the Appointing Authority or the Presiding Officer to do otherwise, I will comply with the following restrictions on my travel and communications:
1. I will not discuss, transmit, communicate, or otherwise share documents or information specific to the case with anyone except as is necessary to represent my client before a military commission. In this regard, I will limit such discussion, transmission, communication or sharing to: (a) persons who have been designated as members of the Defense Team in accordance with applicable rules, regulations, and instructions; (b) commission personnel participating in the proceedings; (c) potential witnesses in the proceedings; or (d) other individuals with particularized knowledge that may assist in discovering relevant evidence in the case. Such discussions, transmissions, or sharing may include consulting with other legal professionals for assistance with defense tasks that I may have otherwise personally undertaken consistent with this agreement, and any other applicable laws, military commission

orders, instructions, rules, regulations, or directives. I understand that I may not share attorney confidences, attorney work product, or any Protected Information with anyone unless that individual has been previously approved for that specific type of relationship or information as part of the Defense Team in accordance with paragraph II(C) of this affidavit. In the case of doubt regarding whether I may share information about a case with another, I understand that I have an affirmative duty to request clarification from the Appointing Authority or Presiding Officer before discussing, transmitting, communicating, or otherwise sharing documents or information. I understand that nothing in this agreement allows me to disregard any laws, rules, regulations, or instructions governing the handling of classified information and material, or other Protected Information.

2. Once proceedings have begun, I will not travel from the site of the proceedings without the approval of the Appointing Authority or the Presiding Officer. I understand the Presiding Officer or the Appointing Authority will not unreasonably restrict travel from the site of the proceedings during extended breaks in commission proceedings.

F. At no time, to include any period subsequent to the conclusion of the proceedings, will I make any public or private statements regarding any closed sessions of the proceedings or any document or material constituting Protected Information under MCO No. 1. This restriction does not apply to discussions with other members of the Defense Team or the Chief Defense Counsel who are appropriately authorized

to receive the specific Protected Information in question, when such disclosure is related to the Defense efforts on behalf of the Accused during military commission proceedings or subsequent review. I understand that nothing in this agreement allows me to disregard any laws, rules, regulations, or instructions governing the handling of Protected Information.

- G. I understand and agree to comply with all rules, regulations and instructions governing the handling of classified information and material or other Protected Information.
- H. I understand that there may be reasonable restrictions on the time and duration of contact I may have with my client, as imposed by the Appointing Authority, the Presiding Officer, detention authorities, or regulation.
- I. I understand that communications with an Accused are not protected if they would facilitate criminal acts or a conspiracy to commit criminal acts, or if those communications are not related to the seeking or providing of legal advice.
- J. I agree that I shall reveal to the Chief Defense Counsel, and any other appropriate authorities, information relating to the representation of my client to the extent that I reasonably believe necessary to prevent the commission of a future criminal act that I believe is likely to result in death or substantial bodily harm, or significant impairment of national security.

K. I understand and agree that nothing in this Affidavit and Agreement creates any substantive, procedural, or other rights for me as counsel or for my client(s).

/s/ _____

Print Name: _____

Address: _____

Date: _____

STATE OF)

COUNTY OF)

Sworn to and subscribed before me, by _____, this ____ day of _____, 20__.

Notary

My commission expires: